REME COURT. U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM

No. 893

Supreme Court, U.S.
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STATE OF MINNESOTA EX REL.
ARTHUR B. KONS

Petitioner,

vs.

RALPH H. TAHASH, WARDEN,
MINNESOTA STATE PRISON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. In a state habeas corpus proceeding involving an attack on a 1941 murder conviction, did petitioner, solely on the basis of his own uncorroborated assertions and without calling counsel who was available, establish by a preponderance of the evidence that he was denied the adequate assistance of counsel?

State court held: negative.

2. Did state violate petitioner's constitutional right to assistance of counsel in a habeas corpus case where it stated:

> "Unless defendant is denied a constitutional right which is prejudicial and casts doubt on his guilt or innocence, procedural irregularities in his arraignment do not require that he be permitted to withdraw his plea of guilty if it is apparent that no miscarriage of justice resulted."?

STATEMENT OF FACTS

At the outset respondent calls attention to the fact that petitioner, both in his statement of questions presented and in his statement of facts, asserts as fact, matters based solely upon his unsupported allegations which were not believed either by the state district court or the state supreme court.

On January 13, 1941, petitioner was sentenced to life imprisonment following his conviction after a plea of guilty to an indictment charging him with the crime of murder in the second degree. The indictment charged the commission of the crime in substantially the following manner:

> ". . . Arthur B. Kons, . . . on the 11th day of December, A.D. 1940 at the Township of Stanton in the County of Goodhue, State of Minnesota wilfully, unlawfully, wrongfully, and feloniously, without authority of law, without justification, or excuse and without deliberation

or premeditation, and with a design on the part of him, the said Arthur B. Kons, to effect the death of a human being, to-wit: Martin Wangen, assault, kill, and murder said Martin Wangen by then and there shooting him, the said Martin Wangen with a loaded firearm, to-wit: a 32 calibre revolver and thereby inflicting upon the head, body, and person of said Martin Wangen, mortal wounds and injuries and from which wounds and injuries so inflicted by said Arthur B. Kons, said Martin Wangen did die in said County of Goodhue, State of Minnesota, on the 11th day of December, 1940, ..."

Twenty three years later, on September 15, 1964, Kons filed a petition for a writ of habeas corpus, in the Minnesota district court, claiming a denial of constitutional rights. He alleged that he was denied the benefit of adequate and effective counsel in the proceeding leading to his conviction. Evidentiary hearings were held on March 19, 1965, and again April 12, 1966.

The arraignment record disclosed that upon a finding that petitioner was without funds to retain his own legal counsel, the trial court had appointed Mr. Clinton H. Bentley to represent him. Upon his appointment the record further shows that a recess in the proceedings was taken during which petitioner conferred with his counsel. The record does not indicate the length of this conference. Only petitioner testified at the habeas hearing as to the length and content of this conference. After stating in his petition that the guilty plea was entered by counsel "immediately . . . without consulting petitioner", Kons testified at the hearings that he had conferred with counsel, but not for more than three or four minutes or five minutes (H.C.$_1$ 33; H.C.$_2$ 6). Petitioner also testified that in his

conference with Mr. Bentley, there was no discussion at all about the crime. (H.C.$_1$ 36). Mr. Bentley, although available, was not called by the petitioner to corroborate any of his claims.

Upon a finding that the petitioner's allegation that he was denied his constitutional rights should be rejected, the state district court denied the petition, explaining:

> "This case has presented some problems to the undersigned. Petitioner rests his sole claim now upon the fact that he was not advised of his constitutional rights and did not have adequate counsel at the time of his plea. The record of his arraignment upon the indictment returned at 2:20 p.m. on January 13, 1941, does indicate that he was immediately, after the return of the indictment, taken before the Court, where an attorney was appointed and only a short conference was had between Petitioner and his attorney, after which the indictment was read and Petitioner's attorney entered a guilty plea. Because of the short period of time for consultation there is raised a serious question of whether counsel had a sufficient time to adequately advise Petitioner of his constitutional rights. However, this Court relies upon the presumption that counsel did advise Petitioner of his rights. Adams vs. Rigg, 252 Minn. 283; Anderson vs. Tahash, 273 Minn. 499; Rankin vs. Tahash, Minn. 2-17-67. The Petitioner's testimony in the evidentiary hearing is totally rejected by this Court except where corroborated by other believable testimony. His petition contains sworn statements which were patently fake such as: 'Bentley was an assistant county attorney when he represented me'; 'I pled not guilty at arraignment'; 'No attorney appointed until after arraignment,; 'I objected to plea of guilty,; 'I deny

signing a confession'; 'Transcript false and untruthful'; 'does not have past criminal record as stated in transcript' and 'admitted to Stillwater Prison at 11:10 a.m. on January 13, 1941.' All of the foregoing statements of petitioner, made under oath, have been proved to be false and without foundation. Therefore, this Court rejects Petitioner's statement that he was not advised of his constitutional rights by Bentley and also rejects his claim of request for counsel prior to arraignment.

"The sentencing court was not dealing with a novice in the criminal trade. Petitioner had been four times convicted of serious offenses: (1) Larceny and robbery, (2) Arson, (3) Robbery, and (4) Assault of a prison guard. He spent at least nine years in prison and it is fair to assume became (during that time) fully acquainted with a defendant's rights in a criminal case. The Court gave him an opportunity to object to the sentencing procedure when he asked Petitioner: 'Do you know of any reason sentence should not be pronounced?' to which Petitioner replied: 'No, sir.'

"Petitioner had made a full confession of the crime for which he was sentenced. His denial of the same bears no weight in view of the testimony of Mr. Holst and the hand-writing expert who examined the signatures to the confession.

"Unfortunately the sentencing court in 1941 did not follow the practice of the courts in recent years of interrogating a defendant in full with regard to his knowledge of the offense charged, his participation therein and his awareness of his right to trial by jury and other constitutional rights. The absence of such knowledge and advice must be proven by Petitioner and he has failed to do so.

> His bare assertions are not sufficient in view of the lack of weight of his testimony and the weight which must be given to the other testimony in the case. In no way has petitioner shown that more time to confer with counsel would have been beneficial to his case. It may be noted that Petitioner's attorney, Mr. Bentley, was not called by him as a witness in the hearing before the undersigned."

On appeal to the Minnesota Supreme Court, the court reviewed the record and determined the evidence supported the conclusion that the presumption that petitioner was adequately advised of his constitutional rights was not overcome. In reaching this conclusion, the state supreme court commented:

> "[T]he habeas corpus court held that relater's testimony was so conclusively impeached it refused to give weight to any of it, except as it was corrobrated. We think the court was justified in reaching this conclusion. . . ." (Petitioners Brief A. 12)

ARGUMENT

I

The Minnesota Supreme Court Properly Found That The Petitioner In A 1964 State Habeas Corpus Proceeding Failed To Establish By A Preponderance Of The Evidence That He Was Denied Adequate Assistance Of Counsel In The Proceedings Leading To His 1941 Murder Conviction.

In considering petitioner's contention that he did not receive adequate assistance of court appointed legal counsel, both the state district court and the state supreme court properly proceeded on the basis that the burden was on the petitioner to prove his allegations. *Wilson v. Rose*, 366 F. 2d 611 (9th Cir. 1966); *U. S. ex rel. Marshall v. Wilkins*, 338 F. 2d 404 (2nd Cir. 1964); *U. S. ex rel. Conroy v. Pate*, 240 F. Supp. 237 (D.C. Ill. 1965). Petitioner must prove his allegation by a preponderance of the evidence. *Walker v. Beto*, 387 F. 2d 626 (5th Cir. 1967); *U.S. ex rel. Brennan v. Fay*, 353 F. 2d 56 (2nd Cir. 1965); *Hall v. Warden*, 313 F. 2d 483 (4th Cir. 1963), cert. den.; *Pepersack v. Hall*, 374 U.S. 809, 83 S. Ct. 693. Additionally the Minnesota courts gave effect to the presumption of regularity which attaches to a judgment of conviction when it is attacked collaterally. *Baez v. Rodriguez*, 381 F. 2d 35 (10th Cir. 1967); *Huffman v. Beto*, 260 F. Supp. 63 (D.C. Tex. 1966); *Paul v. Waters*, 109 F. Supp. 195, affirmed 204 F. 2d 510 (10th Cir. 1953). This presumption of regularity may only be overcome by competent evidence, and it may not be lightly set aside on collateral attack by way of habeas corpus. *Huffman v. Beto, supra*; *U. S. ex rel. Dugger v.*

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Murphy, 219 F. Supp. 596 (D.C. N.Y. 1963). The Minnesota Supreme Court found that petitioner's bald, uncorroborated assertions, most of which were conclusively impeached by the record itself, were not sufficient to satisfy his burden of proof and thus did not overcome the presumption of regularity. A review of all the files and records clearly supports the finding of the Minnesota Court. The record itself discloses that counsel was appointed to represent petitioner prior to this plea and that thereafter counsel conferred with petitioner. In the absence of an affirmative showing to the contrary there is a controlling presumption that court-appointed counsel conferred with and advised the accused of his rights. *State ex rel. Adams v. Rigg*, 252 Minn. 283, 89 N.W. 2d 898, cert. den. 358 U.S. 898, 79 S. Ct. 224, 3 L. Ed. 2d 149. This presumption is of course only overcome by clear and convincing evidence, and where, as here, counsel although available was not called to corroborate petitioner's assertions, the trial court must give close scrutiny to the entire record and make a judgment on the petitioner's credibility. *State ex rel. Schuler v. Tahash*, 278 Minn. 302, 154 N.W. 2d 200 (1967). Following petitioner's conference with counsel, the court was informed that petitioner was ready to plead, the indictment was read and counsel entered a guilty plea on petitioner's behalf in the presence of petitioner. Though petitioner alleged at the habeas hearing twenty-four years later that he had not acquiesced in the decision to plead guilty, the record discloses that he made no objection when the plea was entered. Further when the court asked: "Do you know of any reason why sentence should not be pronounced upon you, Mr. Kons?", the petitioner responded: "No, sir." The unsupported assertions of petitioner are not sufficient to overcome the presumption of regularity which attaches to the original proceedings.

It should be noted that the record of this original proceeding clearly refutes several of petitioner's claims: that he entered a not guilty plea, that he objected to the appointment of Mr. Bentley as his counsel, that the indictment was issued after the arraignment and sentence, that no attorney was appointed until after arraignment, and that the record was not a complete transcription of the arraignment proceeding. (H.C.$_1$ 32).

Many of the allegations raised under oath either in the petition or in petitioner's testimony were demonstrated to be false in the habeas proceeding. In the petition the claim was made that petitioner was admitted to Stillwater Prison at 11:10 A. M. on January 13, 1941. The testimony of Roy Farnham, prison records officer disclosed that the admission was not until late in the afternoon and petitioner himself testified that he did not return to his jail cell from court until noon or a little after on that day. (H.C.$_1$ 37). Petitioner also testified at the hearing that he had not signed the confession given to the County Attorney. He stated that though the signature appearing on the last page of the confession was his signature, he did not put it there. (H.C.$_1$ 49). This assertion was proven to be patently false by the testimony of the County Attorney who took the confession (H.C.$_1$ 92), the testimony of Roy F. Farnham of the Minnesota State Prison who was acquainted with petitioner's signature (H.C.$_1$ 126), and by the testimony of Milton Flohr, a handwriting expert (H.C.$_2$ 26). The handwriting expert testified upon the order of the court and it is apparent that the court relied heavily on the evidence determining the question of whether the signature was that of petitioner in weighing all evidence presented at the hearing. (See Order of Judge Gillespie dated March 25, 1965, (Peti-

tioner's Brief B-4)) Petitioner did not produce any evidence to challenge the conclusions of the handwriting expert.

Another assertion made by petitioner at the habeas hearing was that only the first one and one-half pages of the confession resulted from answers given by him. A mere reading of this statement demonstrates how preposterous this assertion is. First, one cannot help but notice the convenient cut-off point selected by petitioner. Secondly, the detailed description of petitioner's activities over the years could only have come from petitioner himself.

Perhaps the best indication of just how incredible petitioner's stories are is demonstrated by his assertions, both in his petition and at the habeas hearing, that he had never before been convicted of a crime. Petitioner's prior convictions for (1) Larceny and robbery, (2) Arson, (3) Robbery, and (4) Assault of a prison guard, are a matter of record. Whether petitioner's assertions resulted from an unwillingness to tell the truth or merely from the confused state of his mind, the effect upon the credibility of all his assertions is the same.

In a habeas corpus proceeding the trier of fact is not obligated to accept all of the bald uncorroborated assertions of the petitioner. Federal courts have recognized in many instances that the fact finder in a habeas corpus evidentiary hearing is not required to believe the uncorroborated testimony of the petitioner even where no evidence to the contrary has been introduced. *Walker v. Beto, supra; U. S. ex rel. Dugger v. Murphy, supra*; *Ex Parte Farrell,* 189 F. 2d 540 (1st Cir. 1951), cert. den., 342 U.S. 839, 72 S. Ct. 64; *U. S. ex rel. Angel v. Shaughnessy,* 121 F. Supp. 284 (D.C. N.Y. 1954); *Jackson v. Sanford,* 79 F. Supp. 74 (D.C. Ga. 1948). In *Walker v. Beto, supra,* the petitioner sought to upset a 1946 robbery conviction by way of a habeas corpus action instituted

nineteen years later in 1965. The 5th Circuit Court of Appeals, in commenting upon the testimony adduced at the evidentiary hearing said (387 F. 2d at 627):

> "Walker relied solely on his own testimony at the evidentiary hearing granted by the District Judge. The burden was on him to show by a preponderance of the evidence that he was entitled to the writ, Williams v. Beto, 5 Cir., 1965, 354 F. 2d 698, Welch v. Beto, 5 Cir., 1966, 355 F. 2d 1016. The District Judge, as the fact finder, was not required to believe the uncorroborated testimony of the petitioner, even though no evidence to the contrary had been (or could have been) adduced, Hawk v. Olson, 326 U. S. 271, 279, 66 S. Ct. 116, 90 L. Ed. 61 (1945). This record reveals that in crucial instances Walker's testimony was vague, indefinite, self contradictory, and refuted by the official records."

In *Dugger v. Murphy, supra,* the court, in 1963, considered an attack on a 1947 conviction and noted that where petitioner alone testified in support of his allegations the court was not required to believe him. The court also noted that petitioner's proclivity for falsehood, deception and crime, though not conclusive, must be weighed on credibility in the search for the truth as to what happened in 1947.

In the instant case petitioner alone testified as to the adequacy of his conferences with counsel. His testimony was impeached by the record which demonstrated petitioner's understanding of the nature of the charge and the consequences of his plea. Although petitioner's counsel fortunately was available twenty-three years after the conviction, petitioner chose not to seek to corroborate his allegations and did not call counsel to testify. Because of this and petitioner's demon-

strated untruthfulness with respect to such factors as his extensive prior criminal record, his plea at the time of arraignment, his signing of a confession and his acquiescence in the guilty plea, the state district court determined that his testimony, except where corroborated by other believable testimony, must be rejected. The state supreme court after a full review of the record of the evidentiary hearing determined that the district court was justified in its conclusion.

Respondent submits that petitioner, even after delaying twenty-three years to attack his conviction, has been given full opportunity to demonstrate his allegation that he was denied adequate counsel, and has failed to satisfy his burden of proof on the issue.

II

The Minnesota Supreme Court Did Not Hold That Petitioner Was Required To Offer Evidence Casting Doubt On His Guilt In Order To Prevail On The Denial Of A Constitutional Right.

Petitioner alleges that the Minnesota Supreme Court required him to offer evidence casting doubt upon his guilt as well as establishing the denial of his constitutional right to the adequate assistance of counsel. While the Minnesota Supreme Court acknowledged that the record left no doubt as to petitioner's guilt, it is clear from the opinion the court simply found that petitioner had not been denied his constitutional right to adequate counsel, guilt or innocence notwithstanding. The opinion very directly states (see p. A-4 of petitioner's brief):

> "[W]e have concluded that the record as a whole does not compel a finding that defendant was denied his constitutional rights or that the conviction constituted a miscarriage of justice."

Though it did not form the basis of the State Supreme Court's decision in this case, it is true, as recognized by this Court and by the State Supreme Court in its opinion, that not every denial of a constitutional right is prejudicial. *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, rehearing denied 386 U.S. 987, 87 S. Ct. 1283. If a denial of a constitutional right is found a further inquiry to ascertain prejudice must be made and, in many instances, a consideration as to doubt concerning guilt is relevant in ascertaining prejudice or harmless error. While guilt or innocence is not controlling on a question of harmless constitutional error, it certainly may be con-

sidered in a review of the entire record. In *Johnson v. Burke*, 238 F. Supp. 104 (E.D. Wis. 1965), cert. denied 381 U.S. 932, 85 S. Ct. 1793, the federal district court, in dismissing an allegation of incompetent counsel, commented that there was no claim that the petitioner had any defense to the charge. In *Beckett v. Boles*, 218 F. Supp. 692 (D.C. W.Va. 1963), the petitioner, who had pled guilty to the crime of breaking and entering, sought a writ of habeas corpus alleging the incompetence of counsel. The federal district court denied relief and commented:

> "It is apparent that Beckett had no defense to the charge upon which he was arraigned, and (quoting from Turner v. State of Maryland, 318 F. 2d 852 (4 Cir. 1963)) 'In these circumstances there is no ground for saying that the legal representation afforded Turner' (Read Beckett) '(w)as so inadequate as to warrant the invalidation of his conviction and sentence.' "

The mere reference to the guilt or innocence of a habeas corpus petitioner does not taint the decision of a district court or a court of review. This is certainly true in the instant case where the State Supreme Court expressly concluded that petitioner had not been denied his constitutional rights.

CONCLUSION

Respondent respectfully submits a review of the entire record clearly supports the conclusion of the Minnesota District Court and the Minnesota Supreme Court that petitioner's unsupported assertions were not to be believed and failed to establish the denial of adequate assistance of counsel in petitioner's 1941 murder conviction. Additionally, respondent submits that the State Supreme Court did not require evidence

casting doubt on petitioner's guilt in order to establish a denial of a constitutional right.

Wherefore respondent requests this Court to deny the petition for a writ of certiorari to the Supreme Court of the State of Minnesota.

Respectfully submitted,

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